No. 74-1277

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of two counts of willfully attempting to evade a large part of his income tax for the years 1967 and 1968, in violation of 26 U.S.C. 7201, and two counts of filing false and fraudulent returns for those years, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to five years in prison, all but six months of which were suspended, placed on probation for five years, and ordered to pay the taxes due, with penalties and interest, within 24 months. The court of appeals affirmed (Pet. App. A 11-22).

Petitioner contends that the trial court erred in permitting the government to introduce proof of items of unreported income not included in the bill of particulars, and in limiting petitioner to three character witnesses.

The items of unreported income introduced at trial but not mentioned in the bill of particulars were brought out during the cross-examination of petitioner (Tr. 525-538, 551-559).[1] The trial court made it clear, however, that this evidence was admitted only with respect to the element of willfulness. This ruling was correct and consistent with the well-settled line of decisions holding that a court may permit introduction of similar acts of misconduct where intent is an element of the offense, and where those acts may cast light on that element. *United States* v. *Waller*, 468 F.2d 327, 329 (C.A. 5); *United States* v. *Mancuso*, 444 F.2d 691 (C.A. 5); *Oden* v. *United States*, 410 F.2d 103, 105 (C.A. 5); *United States* v. *Jernigan*, 411 F.2d 471 (C.A. 5).

Here, the evidence in question showed acts similar in nature and in point of time to those charged in the indictments and the bill of particulars, and thereby served a legitimate function in proving petitioner's willfulness. The proof consisted of petitioner's records, which he himself had prepared (Govt. Exs. 70-77). Moreover, petitioner was given every opportunity to make any explanations he wished as to those transactions (Tr. 525-560), and there was a recess over a weekend in which he had ample opportunity to refresh his memory with respect to these facts (Tr. 569). However, on redirect examination, at the beginning of the following week, defense counsel chose not to offer any further explanation on these points (Tr. 601-606).

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[1] "Tr." refers to the trial transcript.

Petitioner further argues (Pet. 8) that the trial court erred in limiting to three the number of character witnesses whom petitioner might call. However, trial courts have broad discretion in setting the number of character witnesses a defendant may call, and appellate courts will not disturb their rulings unless there is a clear abuse of discretion. *Michelson* v. *United States*, 335 U.S. 469, 480. Here, the defense was advised of the ruling before it called any such witnesses, and was able to put on the three witnesses whom it thought would provide the most favorable testimony. Additional character witnesses would not have added anything to what had already been said.

Contrary to petitioner's argument (Pet. 8), the trial court's adherence in this case to a custom of limiting character witnesses to three was not unlawful for failure to exercise discretion. The mere fact that the court referred to a general custom of limiting such witnesses to three and decided to so rule in this case does not mean that the trial court did not exercise its discretion. Rather, it simply found this case an appropriate one for application of the customary rule. As the court of appeals observed (Pet. App. A 16), "[w]e think it clear that the district judge meant no more than to recognize such a long-standing practice which should 'apply here'; that in fact he exercised a sound and reasonable discretion in this particular case."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.